Editor's note: 87 I.D. 612

BROOKS GRIGGS

IBLA 80-924 Decided December 18, 1980

Appeal from decision of the New Mexico State Office, Bureau of Land Management, rejecting oil and gas lease offer NM-A 36164.

Set aside and remanded.

1. Notice: Generally -- Oil and Gas Leases: Generally

Where BLM sends by certified mail a notice to an offeror at his record address that he must file a certificate as to his qualification to hold an oil and gas lease, and the letter is returned to BLM marked "Not Deliverable as Addressed, Unable to Forward," and it is established that nondelivery was due to post office error, the appellant will not be considered to have received notice, and the rejection of the lease offer will be set aside.

APPEARANCES: Craig R. Carver, Esq., Head, Moye, Carver & Ray, Denver, Colorado; James W. McDade, Esq., Washington, D.C., for appellant.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

This appeal is from a decision dated July 24, 1980, by the New Mexico State Office, Bureau of Land Management (BLM), rejecting oil and gas lease offer NM-A 36164. 1/

Appellant's offer for parcel No. 464 was drawn number one at a public drawing held in the State Office on February 13, 1979. The decision gives the following reason for rejecting the offer:

> Pursuant to Washington's Instruction Memorandum No. 80-492, a Certification of Qualifications to Hold a Federal Oil and Gas Lease (Simultaneous) was mailed to Ms. [sic] Griggs on May 20, 1980 by certified return receipt mail. The certification was mailed to Ms. Griggs' address of record, 115 South La Salle, Room 2435, Chicago, IL 60606. The certification was returned to this office marked "Not Deliverable As Addressed, Unable to Forward", on June 2, 1980.
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> The certification states: "Please sign, complete and return to this office the enclosed certification. If the properly signed and completed certification is not returned within 30 days from receipt of this notice, the applicant will have failed to demonstrate qualifications to hold this oil and gas lease and the offer will be rejected." The certification was not filed in this office.
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> Offer to lease NM-A 36164 is hereby rejected as of June 27, 1980, per our Field Solicitor's instructions to use the last date of attempted delivery in calculating the 30 days.

1/ This offer was previously before the Board in Brooks Griggs, 44 IBLA 185 (1979), for reasons unrelated to the present appeal.

> Last attempted date of delivery was May 28, 1980. Therefore, the end of the 30-day period for compliance was June 27, 1980. (See 43 CFR 1810.2.) [Emphasis in original.]

BLM sent appellant's certification via certified mail No. 5606 "Restricted Delivery" to his address of record which is the address of Stewart Capital Corporation (Stewart), appellant's filing service. Quoting the Domestic Mail Manual section 933.1, appellant states that restricted delivery

> is a service by which a mailer may direct that delivery be made only to the addressee or to an agent of the addressee who has been specifically authorized in writing to receive his mail. This service is available only for articles addressed to natural persons specified by name.

Affixed to the envelope bearing the certification is a sticker marked "05/28/80, Return to Sender, Not Deliverable as Addressed, Unable To Forward." The envelope was returned to the New Mexico State Office and is date stamped by that office June 2, 1980.

Appellant contends that Stewart at no time received an attempt to deliver the envelope in question. With his statement of reasons, appellant has included the affidavit of one of Stewart's employees. The affidavit asserts that the New Mexico State Office routinely mails the correspondence of its clients to the South La Salle Street address via restricted delivery. The affidavit goes on to explain Stewart's procedure for handling such correspondence:

> Unable to sign for such documents, Stewart Capital Corporation has determined that it should have these documents forwarded to the client at his/her permanent address. Consequently, the envelopes so marked which are received by Stewart Capital Corporation are marked "Please Forward" and the client's permanent address is affixed. A copy of the envelope is taken to verify the forwarding request and the envelope, unopened, is given back to the postman for further handling. Stewart Capital Corporation then immediately notifies the client to expect the envelope and requests that the client advise it as to the contents of the envelope so that it can advise the client as to the proper method of complying with the BLM's request. If Stewart Capital Corporation has received no response to this letter from the client within a week or so, it contacts the client to see if the letter has, in fact, been received by the client. If not, steps are then taken to obtain a copy of the contents of the envelope directly from the Bureau of Land Management office from which it originated.

With respect to appellant's mail, the affidavit states:

> In the case of Brooks Griggs, as regards the above referenced lease, Stewart Capital Corporation's records indicate that two restricted delivery letters addressed to Brooks Griggs were successfully forwarded to Mr. Griggs per the procedure outlined above. The first instance, occurring in February, 1980, involved a notice of rental due, and the second instance, occurring in July, 1980, involved a decision rejecting the offer to lease. There is no written record of any attempt being made by the Post Office to deliver any other restricted delivery letters to Brooks Griggs regarding this lease at Stewart Capital Corporation's Chicago office. In particular, there is no record of any attempt to deliver the restricted delivery letter during May 28, 1980, to which the July, 1980, Decision of the Bureau of Land Management refers. All employees of Stewart Capital Corporation present during that time have been questioned and none recalls such an attempt. Furthermore, a notation to the effect that such an envelope was received and what action was taken regarding it would have been made in Stewart Capital Corporation's certified letter "log".

Appellant contends that he was prevented from receiving notice because of breach of duty by the post office, that such breach of duty is imputed to the New Mexico State Office, and that under the facts of this case he cannot be considered as having received constructive notice pursuant to 43 CFR 1810.2(b), which provides:

> (b) Where the authorized officer uses the mails to send a notice or other communication to any person entitled to such a communication under the regulations of this chapter, that person will be deemed to have received the communication if it was delivered to his last address of record in the appropriate office of the Bureau of Land Management, regardless of whether it was in fact received by him. An offer of delivery which cannot be consummated at such last address of record because the addressee had moved therefrom without leaving a forwarding address or because delivery was refused or because no such address exists will meet the requirements of this section where the attempt to deliver is substantiated by post office authorities.

Appellant contends that BLM failed to comply with this regulation because it mailed the letter in a manner receivable only by himself. The regulation, appellant points out, requires only that a communication be mailed to a "last address of record," not the person himself. Appellant also argues that under the regulation a presumption of receipt of a document cannot arise where BLM is aware of nondelivery and fails to correspond with an applicant's attorney of record. Appellant suggests that in using restricted delivery BLM overreached itself and defeated the object of the regulation -- communication by mail reasonably certain to provide notice to an applicant.

[1] The question presented for decision is whether appellant had sufficient notice to enable him to file his qualifications in connection with lease offer NM-A 36164. We think not.

43 CFR 1810.2(b) states that an offer of delivery which cannot be consummated because the addressee has moved without leaving a forwarding address, or because delivery is refused, or because no such address exists, will serve as notice where the attempt to deliver is substantiated by the post office.

As appellant has pointed out, none of these three circumstances is present in the case before us. In Jack R. Coombs, 28 IBLA 53 (1976), where these three circumstances were also absent, the Board held that the fault for nondelivery must rest with the Post Office. Herein, the South La Salle Street address was appellant's address of record, and Stewart, the addressee's agent, had developed a procedure for handling and forwarding BLM's restrictive service mailings to its clients. On the basis of the affidavit and appellant's uncontroverted statements it appears that no attempt was made to deliver the envelope in question on Wednesday, May 28, 1980, the date of "notice" relied on in BLM's decision. In Joan L. Harris, 37 IBLA 96 (1978), the Board took official notice of relevant postal service regulations incorporated by reference in 39 CFR 111.1. Those regulations require a carrier to leave notice of the certified mail if he cannot deliver the certified letter for any

reason. A letter which is not deliverable is to be held at the post office. If not called for within 5 days, a second notice is to be issued. If the letter is not called for or redelivery requested, it is to be returned to the sender at the expiration of the period stated by the sender or after 15 day if no period is stated.

Had these procedures been followed in the case before us the letter obviously could not have been returned to the New Mexico State Office by Monday, June 2. On the record, it is apparent that the post office erred in its handling of this item of certified mail in that it failed to follow its own required procedures. Since the error prevented appellant from receiving notice, BLM's rejection of his lease offer was not proper. Having disposed of the appeal on this basis, appellant's other arguments need not be discussed.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case is remanded to BLM.

Edward W. Stuebing
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Bernard V. Parrette
Chief Administrative Judge